BEFORE THE TELECOMMUNICATIONS ACCESS POLICY DIVISION,
WIRELINE COMPETITION BUREAU
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Rules for Implementing Filtering Requirements of
The Children's Internet Protection Act
As Applied to Public Libraries under
United States v. American Library Association

CC Docket No. 96-45

EX PARTE COMMENTS
OF
CONCERNED WOMEN FOR AMERICA

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I. INTRODUCTION

Concerned Women for America submits these Comments for consideration by the Wireline Competition Bureau (Bureau) as it promulgates rules for public libraries to implement software filtering requirements in conformity to 21 U.S.C. 2134 and the decision by the U.S. Supreme Court in *U.S. v. American Library Association* (*ALA*), No. 02-361, 2003 U.S. LEXIS 4799 (June 23, 2003), upholding the constitutionality of the Children's Internet Protection Act (CIPA).

II. CONGRESSIONAL PURPOSE AND REQUIREMENTS OF THE CIPA:

The Supreme Court's ruling in *ALA* took note of Congress' purpose for enacting the CIPA:

> By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained. 201 F. Supp. 2d 401, 419 (ED Pa. 2002). The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. *Id.*, at 406. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.
>
> Upon discovering these problems, Congress became concerned that the E-rate and LSTA programs were facilitating access to illegal and harmful pornography. S. Rep. No. 105-226, p. 5 (1998). Congress learned that adults "use library computers to access pornography that is then exposed to staff, passersby, and children," and that "minors access child and adult pornography in libraries." *ALA*, 2003 U.S. LEXIS 4799 at 12, 13.

The CIPA's requirements: "Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." *Id.* at 10, 11.

The CIPA expressly permits unblocking of "wrongly blocked" Web sites and disabling of software filtering in narrowly defined circumstances: "Disabling during certain use. An administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to enable access for bona fide research or other lawful purposes." 21 U.S.C. § 9134 (f) (3).

III. RESPONSE TO FCC's PUBLIC NOTICE:

In the Public Notice on the "Status of CIPA Filtering Rules for Libraries Following Supreme Court Decision," dated June 30, 2003, the Bureau states, "The Supreme Court found that CIPA does not induce libraries to violate the Constitution because public libraries' use of Internet filtering software will be disabled at the request of any adult user and therefore does not violate their patrons' First Amendment rights."

Although the Notice at footnote 5 cites to the concurring opinions by Justices Anthony Kennedy and Stephen Breyer, the above-quoted statement does not completely and accurately express the comments of the Court's opinion authored by Chief Justice William Rehnquist, or the concurring opinions of Justice Anthony Kennedy and Justice Stephen Breyer, or the dissenting opinion of Justice David Souter.

It is vitally important that the rules the Bureau promulgates with respect to when software filtering may be disabled comply with the CIPA and the Court's interpretation. If the rules permit that "software will be disabled at the request of any adult user," that would in effect contradict the language and intent of the CIPA and the Court's holding.

The comments by the Justices are emphatically clear that the provisions for unblocking a Web site and having a filter disabled are not unlimited. Neither the CIPA nor the Court's ruling permits unblocking or disabling a filter simply on the request of

any adult. The request must be either for the purpose of unblocking a wrongly blocked Web site or for the purpose of doing "bona fide research" or other lawful purpose.

Chief Justice Rehnquist made clear that unblocking and disabling a filter are permitted for "any erroneously blocked site" and to "enable access for bona fide research or other lawful purpose":

> Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, *id.*, at 429, and the Solicitor General stated at oral argument that a "library may ... eliminate the filtering with respect to specific sites ... at the request of a patron. With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. § 254(h)(6)(D) (disabling permitted for adults). 2003 U.S. LEXIS 4799 at 28, 29.

Justice Kennedy's concurring opinion also acknowledges that disabling is permitted to view "constitutionally protected Internet material":

> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case. *Id.* at 37.

Justice Breyer acknowledged in his concurring opinion that an adult library patron may access an "overblocked" Web site and have a filter disabled for the purpose of "bona fide research or other lawful purpose":

> At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter." See *ante,* at 12; 20 U.S.C. § 9134(f)(3) (permitting library officials to "disable a technology

protection measure ... to enable access for bona fide research or other lawful purposes"); 47 U.S.C. § 254(h)(6)(D) (same). *Id.* at 44, 45.

Even Justice Souter emphasized in his dissenting opinion that the CIPA cannot be read to permit unblocking "upon adult request, no conditions imposed and no questions asked":

> [T]he unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. First, the statute says only that a library "may" unblock, not that it must. 20 U.S.C. § 9134(f)(3); see 47 U.S.C. § 254(h)(6)(D). In addition, it allows unblocking only for a "bona fide research or other lawful purposes," 20 U.S.C. § 9134(f)(3); see 47 U.S.C. § 254(h)(6)(D), and if the "lawful purposes" criterion means anything that would not subsume and render the "bona fide research" criterion superfluous, it must impose some limit on eligibility for unblocking. ... ("Courts should disfavor interpretations of statutes that render language superfluous"). *Id.* at 67, 68.

IV. INDEPENDENT TESTING OF SOFTWARE FILTERING TECHNOLOGY HAS DEMONSTRATED ITS ACCURACY IN BLOCKING PORNOGRAPHY WITH MINIMAL BLOCKING OF CONSTITUTIONALLY PROTECTED MATERIAL. THIS WILL MINIMIZE LEGITIMATE REQUESTS FOR DISABLING THE TECHNOLOGY OR UNBLOCKING A WRONGLY BLOCKED SITE.

On December 10, 2002, the Kaiser Foundation released the results of a study titled, *See No Evil: How Internet Filters Affect the Search for Online Health Information*, by Paul Resnick, Ph.D., and Caroline Richardon, Ph.D., of the University of Michigan. According to Kaiser, "The Internet filters most frequently used by schools and libraries can effectively block pornography without significantly impeding access to online health information."

According to the study, "When set at the least restrictive level of blocking ("pornography only"), filters block an average of 1.4% of all health sites" and "block an average of 87% of all pornographic sites." The least restrictive setting comports with the

requirements of the CIPA. The Kaiser study was published in the *Journal of the American Medical Association* on December 11, 2002.

In connection with the litigation over the Children's Internet Protection Act (CIPA), the U.S. Department of Justice (DOJ) commissioned eTesting Labs to compare the four leading institutional-grade Web content filtering applications for effectiveness at blocking pornographic material. In October 2001, eTesting Labs compared the accuracy of N2H2 Internet Filtering for Microsoft Proxy 2.0, SmartFilter 3.01, SurfControl's CyberPatrol 6.0, and WebSense 4.3 in blocking 200 randomly selected URLs containing pornography. "Of the products we tested, the N2H2 product provided the best CBR (Correct Blocking Ratio) at 0.980," according to the DOJ report. Among the four major enterprise-filtering providers, N2H2 placed first at 98%, SmartFilter placed second at 94%, WebSense third at 92%, and SurfControl was the least effective at 83%. The study is available at http://www.n2h2.com/etest.php.

V. CONCLUSION:

Opponents of the CIPA will likely attempt to persuade the Bureau to promulgate rules that permit any adult to have a Web site unblocked and a filter disabled or turned off with no questions asked and without reason.

For example, the ACLU's press release mischaracterizes the Supreme Court's decision with respect to disabling requests: "The ruling minimized the law's impact on adults, who can insist that the software be disabled." http://www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=12978&c=55.

The record in *ALA v. U.S.* in the district court established that patrons seldom ask to have sites unblocked, a point made emphatically by the ACLU during trial. The

ACLU's "Proposed Facts" at the conclusion of the trial, which are available online at http://archive.aclu.org/court/findingsFinal.pdf, state:

> 281. The Fulton County, Indiana, library receives only about 6 unblocking requests each year. (Ewick 4/3/02 at 34)
> 282. The Greenville Public Library in Greenville, South Carolina, has received only 28 unblocking requests since August 21, 2000. (Belk 3/29/02 at 52)
> 283. The Westerville Public Library in Westerville, Ohio, has received fewer than 10 unblocking requests since 1999. (Barlow 4/2/02 at 34)

What the American Library Association is proposing would simply render the CIPA a mouse click away from meaninglessness, as Justice Souter emphasized:

> If the patron selects unfiltered access, the next screen could include a message stating: "Click here if you wish the library to disable the entire filter during your Internet session. By clicking on this box, you declare that you will use the Internet for lawful purposes." Upon the patron's assent, the terminal could provide unfiltered Internet access. (CIPA Legal FAQs Last update: 8 July 2003 http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Civil_Liberties,_Intellectual_Freedom,_Privacy/CIPA1/legalfaq.htm.)

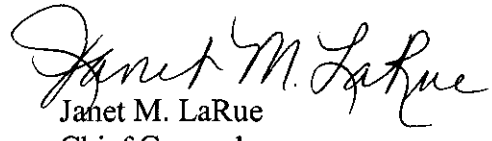
A library staff member must be the one who disables the filter, not the patron.

Some opponents of the CIPA may try to misuse statements made by the Solicitor General during oral argument before the Court in *ALA*. Statements made by counsel are not the law nor do they constitute evidence. The law is expressed in the CIPA and in the Supreme Court's opinion.

We respectfully urge the Bureau to promulgate rules that comply with the language and intent of Congress expressed in the CIPA and with the holding of the Supreme Court. A request for unblocking a Web site must be limited to unblocking a "wrongly blocked" Web site to permit access to constitutionally protected material. A request to disable or turn off the blocking technology must be limited to engaging in "bona fide research" or for "other lawful purpose."

Furthermore, because of the accuracy of software filtering, legitimate requests for unblocking or disabling a software filter should be minimal.

Respectfully submitted,



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